*THE HON'BLE SRI JUSTICE P.S.NARAYANA

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+ WRIT PETITION NO.3620 of 1997

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%Dated 10.02.2005

 # 1 G.V.Narsimha Reddy

2 G.V.Mohan Reddy

..... PETITIONERS

$ The Commissioner
Nirmal Municipality, Adilabad District.

.....RESPONDENT

! Counsel for the Petitioner: MR.S.NIRANJAN REDDY

^ Counsel for the Respondent: MR.V.VISWANATHAM

< GIST:

> HEAD NOTE:

? Cases referred

1. **1995 (1) ALD 1 (F.B.)**
2. **1990 (2) ALT 202 (D.B.)**
3. **1978 (1) APLJ 459**

4. **1988 (1) APLJ 188**

5. **AIR 1989 SC 806**

6. **AIR 1941 Madras 259**

7. **1955 An.W.R. 384**

8. **AIR 2005 S.C 15**

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE TENTH DAY OF FEBRUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION NO: 3620 of 1997

Between:

1 G.V.Narsimha Reddy S/o.Narsa Reddy
R/o.Nirmal, Adilabad District.
2 G.V.Mohan Reddy S/o.G.V.Narsimha Reddy
R/o.Nirmal , Adilabad District. Rep by its GPA Holder
Sri G.V.Narsimha Reddy, the 1st Petitioner herein

..... PETITIONERS

AND

The Commissioner
Nirmal Municipality, Adilabad District.

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ or Order or Direction, more particularly one in the nature of Writ of

"Certiorari" calling for the records pertaining to the Order of the Commissioner in his Proceedings Ref.Unauthorised VO.No.33/96-97 Dt:21-2-1997 and quash the same as being illegal, arbitrary, contrary to the provisions of the A.P. Municipalities Act, 1965 and further being unconstitutional and violative of Article 14 of the Constitution of India.

Counsel for the Petitioner: MR.S.NIRANJAN REDDY

Counsel for the Respondent: MR.V.VISWANATHAM and MR.POLISETTI RADHAKRISHNA, S.C. FOR MUNICIPALITY.

The Court made the following:

HONOURABLE SRI JUSTICE P.S.NARAYANA

WRIT PETITION NO.3620 OF 1997

ORDER:

G.V.Narsimha Reddy and G.V.Mohan Reddy, the writ petitioners filed the present writ petition against the Commissioner, Nirmal Municipality, Adilabad District, praying for the issuanace of a writ of “Certiorari” calling for records pertaining to the Order of the Commissioner in his Proceedings Ref.Unauthorised VO.No.33/96-97, dated 21-02-1997 and quash the same as being illegal, arbitrary and contrary to the provisions of the A.P.Municipalities Act, 1965 (for brevity ‘the Act’) and further being unconstitutional and violation of Article 14 of the Constitution of India and pass such other suitable orders.

2. Elaborate affidavit sworn to by the first petitioner narrating several details was filed in support of writ petition. The respondent-Municipality filed a counter affidavit and the petitioners also filed a reply affidavit thereto.

3. Sri V.M.Chary, representing Sri S.Niranjan Reddy, the learned counsel for

the petitioners had taken this Court through the contents of the affidavit filed in support of the writ petition, the counter affidavit and the reply affidavit and had pointed out that the petitioners, in the facts and circumstances, are entitled to the benefit of the deemed permission. The learned counsel also pointed out to several provisions of the Act and also maintained that the provisional order was not issued at all and hence, the confirmation order is bad in law. The learned counsel also pointed out that even in the impugned order no reasonable time had been specified, and in the facts and circumstances, the same cannot be said to be sustainable. The learned standing counsel also placed reliance on ***3 ACES v. MUNICIPAL CORPORATION OF HYDERABAD*** a decision of the Full Bench decided in relation to the provisions of the Hyderabad Municipal Corporation Act, 1955.

4. Per contra, Sri Polisetty Radha Krishna, the learned Standing Counsel, representing the respondent-Municipality had submitted that in the light of the stand taken in the counter affidavit by the Municipality, it is clear that the procedure had been followed in accordance with law. The provisional order and the confirmation order had been issued only because of the deviation of the sanctioned plan. The standing counsel also pointed out that the application of the 1st petitioner was rejected and hence, the provisions relating to the deemed permission would not come into play at all. The learned standing counsel also made certain submissions relating to the scope, ambit and powers conferred on the respondent by virtue of the provisions of the Act.

5. Heard the counsel.

6. The petitioners had questioned the proceedings of the respondent in Ref. Unauthorized VO. No.33/96-97, dated

21-02-1997, where under it was specified that to the Notice dated 15-02-1997 issued under Section 228 (2) of the Act, no reasons had been explained, hence the provisional order had been confirmed and after the receipt of the said order within three days, the constructions made without permission and in deviation of the rules and regulations to be removed in default, the Municipality would remove the same and the expenses to be recovered from the petitioners and the Municipality would not be responsible for the consequential difficulties, which may flow there from.

7. The stand taken by the petitioners is that they are the owners of an extent of 21 guntas of land in Sy.No.1901 abutting National Highway No.7, Nirmal. After obtaining the requisite permission from the respondent-Municipality vide proceedings No.D/706/93, dated 25-08-1993, on the same day, the petitioners started construction of the ground floor of Commercial complex in the said survey number and it is also stated that the said permission was granted by the respondent-Municipality on the directions of the Regional Joint Director, Town Planning, Warangal.

8. Specific stand was taken that the construction of the ground floor was made as per the revised permit granted by the respondent-Municipality on 25-08-1993. Subsequent thereto, the first petitioner made an application with the plan

for grant of permission for making constructions on the first floor on 28-03-1995 and also paid the requisite fee towards the permission and the respondent-Municipality had not passed any order on his application for more than 60 days and had not communicated either the acceptance or rejection of his application. Hence, as per Section 213 and 215 of the Act, it should be taken that the deemed permission had been granted. It was also stated that before proceeding with the construction of the partition walls, the petitioners received an offer from a Nationalized Bank. But however, subsequent thereto, the Nationalized Bank did not evince any interest and hence the petitioners proceeded with the partition for the purpose of granting leases to various individuals and some of the persons also had entered into lease agreements with the first petitioner and had opened their shops on the first floor.

9. It is further averred that the respondent-Municipality without any proper reason or without any action issued a notice to the first petitioner vide proceedings dated 21-02-1997 referred to supra referring to an earlier provisional order dated 15-02-1997. Specific stand was also taken that no provisional order of the respondent-Municipality and no such any other order had been served on the first petitioner. Hence, in the light of the deemed permission by virtue of Section 213 and 214 of the Act and also in view of the fact that no provisional order at any point of time had been served on the first petitioner and also in view of the fact that no reasonable time as such had been specified even in the impugned order and in the light of Section 215 and 228 of the Act, the petitioners had taken a stand, the impugned order is arbitrary and

unconstitutional being violative of the provisions of the Act and Article 14 of the Constitution of India.

10. The respondent-Municipality filed the counter affidavit wherein the Municipality had taken a stand that the petitioners obtained permission vide Roc.No.D/706/93, dated 25-09-1993 for construction of Ground Floor of Commercial Complex and the said permission was granted as per Rules by showing the parking place with two passages and the copy of the plan had also been enclosed. It was stated that the petitioners constructed a ground floor against the sanctioned plan. Permission was taken for construction of shopping complex by leaving sufficient parking place by two 30-0' wide passage from National Highway No.7 to inside of the proposed site and 15-0' wide front set back. But the petitioners had not left the two 30-0' wide passages and some portion was constructed by leaving 10'-0 set back instead of 15-0' with cellar portion and the municipality issued P.O & C.O. notices vide U.C.R.No.34/93 dated 02-11-1993 and 10-11-1993 respectively and also served on the first petitioner on

07-11-1993 and 16-11-1993.

11. Further, specific stand was taken that the application submitted by the petitioners for construction of the first floor on 28-03-1995 was refused on 05-05-1995 and the refusal notice also was issued on 06-05-1995. But, however the first petitioner started the construction of first floor before submitting the application and the Municipality issued P.O & C.O. notices vide U.C.R.No.19/94 on 18-03-1994 and 02-04-1994 respectively and served on the

petitioner on 30-03-1994 and 04-04-1994.

12. The other allegations were specifically stated that a show cause notice in accordance with Section 228 (1) of the Act had been issued and after following the due procedure only, the impugned order was made and hence, it cannot be said that the impugned order is contrary to any of the provisions of the Act. In the light of the above facts, so-called deemed permission also is not applicable to the facts of the present case.

13. A reply affidavit, in detail, had been filed again reiterating the self same stand taken in the affidavit filed in support of the writ petition and in para-8 of the reply affidavit, stand was taken that after the impugned order was passed on 21-02-1997, the first petitioner was constrained to file a writ petition and this Court by order dated 25-02-1997 had granted interim suspension of the impugned order dated

21-02-1997. Thereafter, the respondent-Municipality prepared a provisional order, dated 15-02-1997 which was sent by registered post on 06-03-1997 and which was received by the first petitioner on 10-03-1997. The postal cover annexed along with reply affidavit clearly bears out that the provisional order was posted only on 06-03-1997 after the orders of this Court were communicated by creating and antedating the alleged provisional order.

14. The impugned order had already been specified supra. The impugned order was made on the ground of the constructions having been made without

permission in deviation of the plan, the constructions being not in accordance with law. Specific stand was taken that no provisional order, in fact, had been made at any point of time and the same was not served on the petitioners.

15. No doubt respondent-municipality had taken specific stand that the application made by the petitioners for grant of permission was refused. Section 209 of the Act deals with 'Application to construct or reconstruct buildings.'

16. Section 215 of the Act deals with 'Grounds on which approval of sites for or licence to construct or reconstruct building may be refused' which reads thus:

> **Sec.215. Grounds on which approval of sites for or licence to construct or reconstruct building may be refused:---**
>
> The only grounds on which approval of a site for the construction or reconstruction of a building or permission to construct or reconstruct a building may be refused are the following, namely:--
>
> (1) that the work, or use of the site for the work or any of the particulars comprised in the site plan, ground plan elevations, sections or specification would contravene some specified provision of any law or some specified order, rule, declaration or bye-laws made under any law.
>
> (2) that the application for such permission does not contain the particulars or is not prepared in the manner required under rules or bye-laws;
>
> (3) that any of the documents referred to in Section 209 have not been sikned as required under rules or bye-laws;

1. that any information ("or a copy of the title deed of the land duly attested by a Gazetted Officer of the Government together with an urban land ceiling clearance certificate, or as the case may be, an affidavit referred to in Section 184 are not furnished") or documents required by the Commissioner under rules or bye-laws have or have not been duly furnished.

2. that streets or roads have not been made as required by Section 184.

3. that the proposed building would be an encroachment upon Government or municipal land.

Whenever the Commissioner refuses to approve a building site for a building or to grant permission to construct or reconstruct a building, the reasons for such refusal shall be specifically stated in the order.

17. Section 214 of the Act deals with 'Effect of delay in grant or refusal of approval or permission', which reads thus:

"Sec.214. Effect of delay in grant or refusal of approval or permission:--

If within the period prescribed by Section 212 or Section 213, as the case may be, the Commissioner has neither given nor refused its approval of a building site, or its permission to execute any work, as the case may be, such approval or permission shall be deemed ton have been given; and the applicant may proceed to execute the work, but not so as to contravene any of the provisions of this Act or any rules or bye-laws made under this Act."

18. Section 228 of the Act deals with 'Demolition or alteration of building work unlawfully commenced, carried on or completed', which reads as hereunder:

Sec.228. Demolition or alteration of building work unlawfully commenced, carried on or completed:--

(1) If the Commissioner is satisfied—

(i) that the construction or reconstruction of any building or well—

a. has been commenced without obtaining the permission of the Commissioner or the chairman as the case may be, or where an appeal has been made to the council, in contravention of any order passed by the council; or

b. is being carried on, or has completed, otherwise than in accordance with the plans or particulars on which such permission or order was based; or

(c) is being carried on, or has been completed, in breach of any of the provisions of this Act or of any rule or bye-law made under this Act or of any direction or requisition lawfully given or made under this Act or such rules or bye laws; or

(ii) that any alterations required by any notice issued under Section 217 have not been duly made; or

(iii) that any alteration of or addition to any building or any other work made or done for any purpose into or upon, any building, has been commenced or is being carried on or has been completed in breach of Section 227.

he may make a provisional order requiring the owner or the builder to demolish the work done or so much of it as in the opinion of the said officer, has been unlawfully executed or to make such alterations as may, in his opinion, be necessary to bring the work into conformity with the Act, bye-laws, rules direction or requisition as aforesaid, or with the plans and particulars on which such permission or order was based; and may also direct that until the said order is complied with, the owner or builder shall refrain from proceeding with the building or well.

1. The said officer shall serve a copy of the provisional order made under Sub-section (1) on the owner of the building or well, together with a notice requiring him to show cause within a reasonable time to be named in such notice why the order should

not be confirmed.

2. If the owner fails to show cause to the satisfaction of the said officer, he may confirm the order with such modification as (he thinks fit) to make, and such order shall then be binding on the owner."

19. The words, "he may make a provisional order requiring the he may make a provisional order requiring the owner or the builder to demolish the work done or so much of it as in the opinion of the said officer, has been unlawfully executed or to make such alterations as may, in his opinion, be necessary to bring the work into conformity with the Act, bye-laws, rules direction or requisition as aforesaid, or with the plans and particulars on which such permission or order was based; and may also direct that until the said order is complied with, the owner or builder shall refrain from proceeding with the building or well" are noteworthy.

20. The words "the said officer shall serve a copy of the provisional order made under Sub-section (1) on the owner of the building or well" and also the words "notice requiring him to show cause within a reasonable time to be named in such notice" and the words "if the owner fails to show cause to the satisfaction of the said officer, he may confirm the order with such modification as he thinks fit" in Sub-sections (2) and (3) assume lot of importance while dealing with the powers of the Commissioner and the mode and the method of the exercise of the said powers and the discretion to be exercised in relation thereto and under what circumstances while exercising such powers under Section 228 of the

Act.

21. In the decision (cited 1 supra), the Full Bench of this Court while dealing with Section 437 of the Hyderabad Municipal Corporation Act, 1955 had laid down certain guidelines and procedure to be followed by the Corporation. In relation to Section 452 of the Said Act, the guidelines which are specified as hereunder:

> "Having regard to the rampant, illegal and unauthorized constructions raised in the country, the following guidelines have to be followed by the Corporation in respect of illegal constructions. The guidelines should not be treated as exhaustive but only illustrative and the discretion to be exercised by the Corporation in any given case should not be arbitrary or capricious.
>
> 1. In cases where applications have been duly filed in accordance with law, after fulfilling all requirements, seeking permission to construct buildings and permission was also granted by the Corporation, the power of demolition should be exercised by the Corporation only if the deviations made during the construction are not in public interest or cause public nuisance or hazardous or dangerous to public safety including the residents therein. If the deviations or violations are minor, minimal or trivial which do not affect public at large, the Corporation will not resort to demolition.
>
> 2. Whatever is stated in guideline number (1) will also equally apply to the permissions deemed to have been granted under Section 437 of the Act.
>
> 3 . If no application has been filed seeking permission and the construction is made without any permission whatsoever, it is open to the Corporation to demolish and pull down or remove the said unauthorized structure in its discretion. Otherwise, having regard to the facts and circumstances of the case, it will be putting a premium on the unauthorized construction.
>
> When the Corporation comes to the conclusion, keeping the above guidelines in view, that the construction in question is required to be demolished or pulled down, it should follow the procedure indicated below.
>
> (i) The demolition should not be restored to during festival days declared by the State Government as public holidays excluding Sundays. If the festival day declared by the Government as a public holiday falls on a Sunday, on that Sunday also, the Corporation should not resort to demolition.
>
> (ii) In any case, there should not be any demolition after sun set and before sunrise.

(iii) The Corporation should give notice of demolition as required by the statute fixing the date of demolition. Even on the said date, before actually resorting to the demolition, the Corporation should give reasonable time, depending upon the premises sought to be demolished, for the inmates to withdraw from the premises. If within the time given the inmates do not withdraw, the Corporation may proceed with actual demolition. These guidelines are laid down in view of the fact that the Corporation is a public authority and its action must be tested on the touchstone of fairness and reasonableness."

22. Here is a case where the petitioners had taken a specific stand that inasmuch as no communication was received either accepting or refusing the application made by the petitioners praying for permission in the light of the provision relating to the deemed permission, it is stated that the petitioners had further proceeded with the construction in accordance with law. It is no doubt true that the presentation of a valid application is a ***sine qua non*** and several statutory requirements are to be satisfied while invoking the provisions relating to the deemed permission.

23. In ***KUKATPALLY MUNICIPALITY v. P.SATYANARAYANA***, the Division Bench while dealing with Section 228 and 345 of the Act-Zonal Development Regulations, observed at para-10, which reads thus:

"There is another relevant aspect regarding which the Municipal Council did not address itself while disposing of the appeal. Even if the construction had taken place unauthorisedly without valid sanction, it does not necessarily merit demolition of the building. We have already referred to the decided cases on the subject. The considerations of equity and public interest should be kept in view in exercising the discretion whether to order demolition or not. This discretion confided to a statutory authority, should be exercised judiciously and reasonably. At this juncture, it is

pertinent to take note of the Advocate-Commissioner's report regarding the alignment of the building in relation to the public road. The Advocate-Commissioner has reported that the distance between the building and the middle of the road is 53 feet on the eastern and western directions and about 50 feet from the balcony (where elevation was being undertaken). Therefore, he pointed out that "most of the buildings on either side of the road are in one line including the buildings which is sought to be demolished". It is evident from his report that almost all the buildings in the street in question do not comply with the requirement with regard to distance from the public road and the set off to be maintained according to the Zonal Development Regulations. It is also relevant to take note of the fact that the petitioner has given an undertaking that as and when the Zonal Development Regulations are enforced by ensuring that the building on either side of the road maintains a set back of 75 feet from the center of the road, he would demolish the construction at his cost without claiming any compensation. He also expressed his willingness to pay the compounding fee, if any, levied by the Municipality."

24. In ***MUNICIPAL CORPORATION, HYDERABAD v. SHAMSHUDDIN HASAN*** while dealing with Section 452 of the Hyderabad Municipal Corporation Act, 1955, it was held that:

"A reading of the Section shows that if a building is constructed contrary to the provisions of the Act or the by-laws, and if the person concerned fails to show sufficient cause as to why the said building should not be removed, altered or pulled down, the Commissioner 'may' remove, alter or pull down the said building. It is not mandatory on the part of the Commissioner to remove or pull down the building. The work 'may' does not mean 'shall' in all cases, though in some cases it may mean that. No compelling reasons are shown as to why we should interpret the work 'may' in Section 452 as 'shall'. Hence, in the opinion of the Court it is left to the discretion of the Commissioner either to remove or pull down the building and he has to exercise that discretion not arbitrarily or capriciously, but reasonably depending on the circumstances of each case. It is neither possible nor desirable to lay down the conditions in which he could direct the demolition of a building."

25. Similar view had been expressed in ***P.HEMALATHA v. RAJAHMUNDRY MUNICIPALITY.*** The observations made in ***M/S.RAJATA ENTERPRISES v. S.K.SHARMA*** also may be usefully referred to in this regard.

26. In ***MAYANDI CHETTIAR v. MADURA MUNICIPALITY***, the Division Bench of Madras High Court while dealing with Sections 216, 338 and 339 of the Madras District Municipalities Act, held that:

> "Sections 338 and 339 cannot be properly applied in the case of buildings because Section 216 specifically provides what shall be done when there is an infringement of the building regulations. Section 216 applies to a case where a person has completed a building without sanction. Therefore, except in the case of buildings, direct action may be taken under Sections 338 and 339. The completion of a building, as well as the commencement of a building, without municipal sanction are within the scope of Section 216. The fact that the word 'may' is used in Section 216 (1) does not leave it to the option of the executive authority to proceed under Section 216 or Section 338. The executive authority may not deem it necessary to take any action in the compromise of a building work but if it does it must proceed according to Section 216."

27. The method and mode of the exercise of the discretion had been well considered in ***KAKINADA MUNICIPALITY v. DUYYURI SATYANARAYANA.***

28. Hence, in the light of the clear language employed in Sub-sections 1, 2 and 3 of Section 228 of the Act, it is crystal clear that the Commissioner of the Municipality has to exercise the discretion in the case of taking a decision in relation to ordering of demolition and the said discretion to be exercised not arbitrarily or capriciously but on just and reasonable grounds.

29. In ***M/S.AERO TRADERS PVT. LTD. v. RAVINDER KUMR SURI*** the three Judge Bench of the Apex Court while dealing with the word 'discretion' under the provisions of Delhi Rent Control Act, 1958 observed as follows:

> "The word 'discretion' connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard and fast rule, and it requires an actual exercise of

> judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. When it is said that something is to be done with the discretion of the authorities that something is to be done according to the rules of reason and justice and not according to private opinion; according to law and not humour."

30. In the present case, though specifically no mala fides as such had been attributed to the officer concerned, specific stand was taken that at no point of time, the provisional order was served on the petitioners. Further, it was clarified in the reply affidavit that to put the proceedings in order after the granting of the interim order by this Court, an anti dated order had been made with a view to show that the impugned proceeding is in accordance with law.

31. No doubt certain submissions were made referring to the reasonableness of the time granted under the impugned order. This aspect need not be dealt with elaborately for the reason that this Court is satisfied that in the absence of the material to show that there was actual service of the provisional order on the petitioners necessarily, this Court may have to arrive at a conclusion that the impugned order made is not in accordance with law. The other questions also need not be dealt with in detail at this stage. It is suffice to state that inasmuch as the impugned order was made not accordance with the provisions of Sub-sections 1 and 2 of Section 228 of the Act, the said order is hereby quashed. But, however, the respondent-Municipality is given liberty to proceed in accordance with the provisions of the Act, if they require to do so.

32. In the light of the views expressed supra, the writ petition is accordingly

allowed to the extent indicated above. No order as to costs.

_____

Kvr 10th February, 2005

L.R.Copy to be marked: Yes

That Rule Nisi has been made absolute as above.

Witness the Hon'ble Sri Devinder Gupta, the Chief Justice on this the Thursday the tenth day of February, two thousand and five.

_ _____

ASSISTANT REGISTRAR

One fair copy to the Honourable Sri Justice P.S.Narayana, for his lordship's kind perusal

To

1. The Commissioner,
Nirmal Municipality, Adilabad District.
2. 8 L.R. copies
3. The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.
4. The Secretary, A.P. Advocates Association Library, High court Buildings, Hyderabad.
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7. One C.C to Mr.S.Niranjan Reddy, Advocate (OPUC)

8. One C.C to Mr.Polisetti Radha Krishna, Advocate (OPUC)